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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1946.

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**No.** \_\_\_\_\_

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BERT CHARLES BOWKER, PETITIONER,

*v.*

WALTER A. HUNTER, WARDEN OF THE UNITED STATES  
PENITENTIARY, LEAVENWORTH, KANSAS.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE TENTH CIRCUIT.**

Petitioner, Bert Charles Bowker, respectfully petitions the Honorable the Supreme Court of the United States for a writ of certiorari directed to the United States Circuit Court of Appeals for the Tenth Circuit to review the Judgment of said Court affirming the judgment of the District Court of the United States for the District of Kansas.

**OPINIONS BELOW.**

Opinion of the District Court (R. 43-48). Opinion of the Circuit Court of Appeals (R. 51-53) 158 F. 2d 854.

**JURISDICTIONAL STATEMENT.**

Decision of the Tenth Circuit Court of Appeals, January 15, 1947, 158 F. 2d 854; April 14, 1947, order by Mr. Justice Rutledge extending time to file petition for certiorari to May 16, 1947.

The Court has jurisdiction under Section 240 of the Judicial Code, Title 18, U. S. Code 347; and *Waley v. Johnston*, 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302; *Walker v. Johnston*, 312 U. S. 275, 61 S. Ct. 574, 85 L. Ed. 830.

Petitioner is held by a void judgment and sentence and thereby deprived of liberty without due process and in violation of the Fifth Amendment to the Constitution. Neither this court nor any of the lower courts have heretofore held that separate counts under Section 2 of the Mann Act, each referring to the same date, same woman, same transportation by automobile, same points of origin and destination, states more than a single offense.

The record presents a question of statutory construction pertaining to Section 2 of the Mann Act, Title 18, U. S. Code 398. The question is limited to said action.

Public policy in administration and enforcement of Federal Criminal Law is involved.

Decision in the present case conflicts with the decisions of several circuits that transportation is the gist of the offense defined.

Does the Federal Probation Law, Title 18, U. S. Code 724, for a single offense authorize probation following a term of imprisonment, is also involved.

The trial court had power to free petitioner from his unlawful imprisonment and its denial of power, approved by Circuit Court although not specifically decided, is in conflict with decision of this Court.

### THE QUESTIONS PRESENTED.

Unlawful imprisonment resulting from sentence imposed after expiration for the single offense charged. Relief by habeas corpus.

An indictment in five counts drawn under Section 2 of the Mann Act, 18 U. S. Code 398, and limited to said section by reason of charging transportation by automobile, all of said counts referring to the same date, same woman, same means of transportation, same points of origin and destination, states a single offense.

Where a single offense is stated as set out above, a Federal District Court cannot impose a sentence to a term of imprisonment followed by probation. The Probation Law, Title 18, U. S. Code 724, does not permit it. And after service of the imprisonment, court exceeded its jurisdiction when it imposed a further term of imprisonment.

The further term of imprisonment under the circumstances given above exceeded jurisdiction of the court, violated the constitutional rights of the accused and was void. Habeas corpus was available to question the legality of the imprisonment.

A prisoner held under two commitments, one of which is based upon a judgment invalid or void, who has served in full the imprisonment fixed in the valid commitment, is entitled to be discharged from custody by habeas corpus.

**STATEMENT OF MATTER INVOLVED.**

Petitioner was charged by indictment filed March 6, 1940, (R. 14-18), in the United States District Court for the Western District of Louisiana, Shreveport Division, with violation of one section of the Mann Act, Title 18, U. S. Code, Section 398. Indictment contained five counts, all referring to same date, same woman transported, same means of transportation, and described the same transportation.

COUNT 1, that on or about the 9th day of February, 1940, in the Parish of Caddo, State of Louisiana, this petitioner did "transport and cause to be transported in inter-state commerce from Billings in the state of Montana via Leadville, Colorado, to Shreveport, in the Parish of Caddo, State of Louisiana, via an automobile running over the public highways of the United States, a woman, namely Mrs. Bert Charles Bowker" for the purpose of prostitution, etc.;

COUNT 2, that on or about the 9th day of February, 1940, in the Parish of Caddo, State of Louisiana, this petitioner did procure and obtain a form of transportation, namely, an automobile whereby the said woman was transported.

COUNT 3, that on or about the 9th day of February, 1940, in the Parish of Caddo, State of Louisiana, this petitioner did transport and cause to be transported, and aid and assist in obtaining transportation for and in transporting via automobile the said woman.

COUNT 4, that on or about the 9th day of February, 1940, in the parish of Caddo, State of Louisiana, this

petitioner did aid and assist in obtaining transportation for and in transporting via an automobile, the said woman.

COUNT 5, that on or about the 9th day of February, 1940, in the Parish of Caddo, State of Louisiana, this petitioner did transport and cause to be transported and aid and assist in obtaining transportation for and in transporting via automobile the said woman.

June 21, 1940, petitioner was tried before a jury and found guilty as charged. On Count 1, sentenced to serve eighteen months. On remaining counts it was ordered that imposition of sentence be suspended and this petitioner placed on active probation as of that date (R. 19).

Petitioner served said eighteen months sentence. In May, 1944, the probation officer at Shreveport petitioned the Court to require this petitioner to show cause why his probation should not be revoked for failure to make reports to the probation officer (R. 27), and on December 6, 1944, probation was revoked and sentence imposed of three years on the remaining counts of the indictment (R. 29). Petitioner escaped from jail at Shreveport and was indicted under the Federal Escape Act (R. 38). Plea of guilty was entered January 4, 1945, and sentence was imposed of one year and one day consecutively to the three-year sentence (A. 39, 40). Petitioner was duly committed to the United States Penitentiary, Leavenworth, Kansas (R. 42).

Petitioner filed in the United States District Court for the District of Kansas a petition for a writ of habeas corpus (R. 5-8) setting up that the five counts

charged a single offense; that each count refers to same date, same woman, same points of origin and destination, same means of transportation, namely, an automobile. Further, that the law does not authorize for a single offense a term of imprisonment followed by probation; that the three-year sentence was imposed after expiation for the offense and is void; and that petitioner having served the one-year sentence for escape, his further detention was unlawful. The verified petition alleged further that the verdict "guilty as charged" referred to the single offense shown by the evidence and that such verdict was a finding of guilt of a single offense. Response of the Warden (R. 8-10) contained denials, and included certified copies as follows: Mann Act indictment (R. 14-18), Judgment thereon (R. 18-19), Commitment on eighteen months sentence (R. 19), Petition to revoke probation filed May 19, 1944 (R. 26-27), Judgment revoking probation and sentence of three years (R. 28, 29), Commitment thereon (R. 29-31), Indictment, Judgment and Commitment for Escape (R. 38-42). No oral testimony was given.

The trial judge in Kansas, the Honorable Arthur J. Mellott, in a written opinion (R. 43-48) held that it was unnecessary to construe the indictment as petitioner's only remedy was to have appealed. The Tenth Circuit Court of Appeals affirmed the judgment of the trial court (R. 51-53) but gave a different reason, namely, that Count 2 stated a separate and distinct offense. *Bowker v. Hunter*, 158 F. 2d 854.



## REASONS FOR GRANTING THE WRIT AND AUTHORITIES IN SUPPORT THEREOF.

1. Construction and application of Section 2 of the Mann Act, 18 U. S. Code 398, is involved. This Court will grant a review in such a case. *Cleveland v. United States*, 328 U. S. . ., 91 L. Ed. 1, 67 S. Ct. 13; *United States v. Beach*, 324 U. S. 193, 89 L. Ed. 865; *Mortensen v. United States*, 322 U. S. 369, 88 L. Ed. 1337, 64 S. Ct. 1037. No court heretofore has held that charges of "transport and cause to be transported" and "obtain a form of transportation and transport" based on Section 2 of the Act, state more than a single offense. The statute is highly penal and it is of general importance that the Supreme Court pass on this question.

2. Petitioner is deprived of liberty without due process in violation of Fifth Amendment. When petitioner served in full the eighteen months sentence on Count 1 he paid for his offense. The Court had no power years thereafter to impose three-year sentence. *Re Bradley*, 318 U. S. 50, 63 S. Ct. 470, 87 L. Ed. 608; *Ex parte Lange*, 85 U. S. 163, 21 L. Ed. 872; *Roberts v. United States*, 320 U. S. 264, 64 S. Ct. 113, 88 L. Ed. 41; *Ex parte Nielson*, 131 U. S. 176, 185, 9 S. Ct. 672, 33 L. Ed. 118; *Bowen v. Johnston*, 306 U. S. 19, 24, 59 S. Ct. 442, 83 L. Ed. 455; *Miller v. United States*, 2 Cir., 147 F. 2d 372.

3. Transportation is the gist of the offense defined by the Mann Act. *Ellis v. United States*, 8 Cir. 138 F. 2d 612, *Robinson v. United States*, 10 Cir., 143 F. 2d 276. And the decision of the Tenth Circuit that several counts

drawn under Section 2, 18 U. S. Code 398, all referring to one transportation of one woman, state more than a single offense, is in conflict with those decisions.

4. The decision of the Tenth Circuit Court of Appeals conflicts generally with decisions of the several circuits interpreting the Mann Act. For example, the five counts in the present case all pertain to transportation by automobile and are therefore limited to Section 2 of the Mann Act, 18 U. S. Code 398. Each count refers to the same date, same woman transported, same means of transportation, same points of origin and destination. In *Roark v. United States*, 8 Cir. 17 F. 2d 570, 51 A. L. R. 870, Anno., page 875, the indictment contained four counts pertaining to transportation of the same woman from Texas to Colorado by common carrier, and the Court with considerable hesitancy held that two separate offenses were stated, eg. "transport or cause to be transported" under Section 2 (398) and "induced to go in interstate commerce" under Section 3 (399). Circuit Judge Kenyon dissented.

The decision of the Circuit Court of Appeals conflicts with the decision of the First Circuit in *Malaga v. United States*, 57 F. 2d 822.

The decision of the Circuit Court of Appeals conflicts with the decision of the Eighth Circuit in *Huffman v. United States*, 259 F. 35; decisions of the Ninth Circuit in *Suslak v. United States*, 213 F. 913, and *Tobias v. United States*, 2 F. 2d 361, in which cases several counts were treated as charging a single offense (see annotation, 51 A. L. R. 875).

5. The decision of the Circuit Court in the present case conflicts with the decision of the Eighth Circuit in *Lapage v. United States*, 146 F. 2d 536, 156 A. L. R. 965, 971, and the decision of the Supreme Court in *United States v. Kenofskey*, 243 U. S. 440, 37 S. Ct. 438, 61 L. Ed. 836, in holding that evidence sufficient to sustain the charge of "obtaining a form of transportation and transporting" would be wholly insufficient to sustain a charge of "transport or cause to be transported." The conduct in either instance can be characterized as bringing about transportation. In the *Kenofskey* case it was said that "cause" is a word of broad import and in its well known sense means to bring about.

6. The decision of the Tenth Circuit Court of Appeals in the present case conflicts with the rule established by the Supreme Court for determining single or separate offenses. The rule is stated in *Blockburger v. United States*, 284 U. S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306.

7. Decision of the Circuit Court conflicts with Supreme Court decision in *Ebeling v. Morgan*, 237 U. S. 625, 59 L. Ed. 1151, 35 S. Ct. 710. There the thing prohibited under 18 U. S. Code 312, was the injuring of "any mail bag". Several mail bags were cut and it was held that separate offenses were committed. But in the present case, the thing prohibited is "transportation" and there was only one transportation.

8. The decision of the Tenth Circuit in the present case subjects petitioner to a second punishment after he had fully served a valid sentence for the single offense.

The decision obviously is wrong and adds confusion to interpretation of the Mann Act. The statement of Circuit Judge Parker in *Short v. United States*, 98 F. 2d 614, 112 A. L. R. 969, Anno. 983, quoting Judge Evans, is particularly applicable here. There it was attempted to use two substantive offenses as basis of two conspiracy charges. It was said:

“The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test which is practical, not a theoretical one.”

9. Habeas corpus is available to determine right to discharge from unlawful imprisonment. *Bozza v. United States*, (Feb. 17, 1947), 328 U. S. . ., 67 S. Ct. 645; *In re Bonner*, 151 U. S. 242, 14 S. Ct. 323, 38 L. Ed. 149. Habeas corpus resulted in review by the Supreme Court of similar question in *Ebeling v. Morgan*, 237 U. S. 625, 59 L. Ed. 1151, 35 S. Ct. 710.

10. Ruling of the trial court, District of Kansas, and considered but not decided by the Tenth Circuit Court, that habeas corpus cannot be used to obtain freedom from excessive sentence, citing *U. S. v. Hill*, 3 Cir., 71 F. 2d 906, and *Caballero v. Hudspeth*, 10 Cir., 114 F. 2d 545, is in conflict with the foregoing decisions of the Supreme Court; and decision of Fifth Circuit, *Sprague v. Aderholt*, 45 F. 2d 790; *Miller v. United States*, 147 F. 2d 372; and of the Eighth Circuit in *Biddle v. Thiele*, 11 F. 2d 235, and *Stoneberg v. Morgan*, 246 F. 98, 99.

11. Under the Federal Probation Law, 18 U. S. Code 724, a Federal District Court does not have authority in

sentencing for a single offense to impose a term of imprisonment followed by probation. Power to suspend imposition or execution of sentence and place on probation is statutory. *Roberts v. United States*, 320 U. S. 264, 64 S. Ct. 113, 88 L. Ed. 41; *Escoe v. Zerbst*, 295 U. S. 490, 79 L. Ed. 1566, 65 S. Ct. 818; *Trant v. United States*, 90 F. 2d 718. In *White v. Burke*, 10 Cir. 43 F. 2d 329, it was held that grant of power in the probation law to impose a fine and place defendant on probation, necessarily excludes the power to impose greater punishment, namely, a period of imprisonment followed by probation.

12. Petitioner having served the one year sentence and commitment for escape and the three year sentence being excessive, is estitled to be discharged from custody of the Warden. *Youst v. United States*, 151 F. 2d 666.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court direct to the United States Circuit Court of Appeals, Tenth Circuit, commanding said court certify and send to this Court a full and complete transcript of the record and of the proceedings of the said court in its case Docket No. 3397, Bert Charles Bowker, Appellant v. Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas, Appellee, to the end that this cause be reviewed by this Court as provided for by the statutes of the United States; and that the judgment of said Tenth Circuit Court of Appeals in said cause be reversed by this

Court, and for such further relief as to this Court may seem proper.

BERT CHARLES BOWKER,  
Petitioner,

By HOWARD F. McCUE.  
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